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No. 10-847

Supreme Court, U.S.
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In The
Supreme Court of the United States

WILLIAM THADDEUS TURNER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION

The respondent, the State of Florida (the "State"), argues that there was nothing wrong with the trial court's refusal to give Turner an opportunity to contest the accuracy and applicability of intelligence quotient ("IQ") tests administered by court-appointed experts[1] in July of 2008 (the "2008 IQ Tests"), because the court-appointed experts' determinations are indisputability accurate and applicable.

The State's argument is intellectually disingenuous and serves as a textbook example of *petitio principii* – circular logic, or begging the question – the logical fallacy in which the proposition to be proved is assumed without proof. Here, the propositions requiring proof (the State's various arguments that Turner was not entitled to an evidentiary hearing to determine whether the 2008 IQ Tests results were accurate or applicable) are all predicated on the faulty assumption that the 2008 IQ Tests were irrefutably

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[1] The State's response repeatedly and erroneously characterizes Dr. Daniel Grant, the court-appointed individual who examined Turner on July 17 and 18 of 2008, as Turner's "own expert." Brief in Opposition at 12. Yet, the trial court specifically held that "[Dr. Grant is] not the defense expert. . . . He's the court's expert. Both of these doctors are the court's experts, they're not yours, they're not confidential, they're not anything else. Okay." Supplemental Record on Appeal, Vol. I, pp. 18-19. The trial court explicitly and unequivocally held that Dr. Grant was the court's own expert. The relevant portion of the hearing transcript containing the trial court's statement is included in the appendix to this reply brief.

accurate and undisputedly applicable to the relevant analysis under *Atkins v. Virginia*, 536 U.S. 304 (2002).

The State's argument is illogical. It highlights the Kafkaesque injustice that Turner faces: Turner seeks an evidentiary hearing to contest the applicability and accuracy of the court-appointed experts' determinations, and the court-appointed experts' determinations are presented by the State as an unassailable evidentiary barrier barring Turner's entitlement to an evidentiary hearing to thereby determine the validity of the court-appointed experts' determinations.

Based on this fundamentally flawed argumentative predicate, the State further asserts that Turner "has no stake" in challenging the accuracy and applicability of test results that undisputedly affect whether Turner will live or die. That is facially absurd – the assertion that a capital inmate sentenced to death does not have standing to challenge a ruling that is dispositive on whether the capital inmate can be constitutionally executed is plainly wrong.

Finally, the State completely fails to address Turner's second question presented for review or to address Turner's argument that the trial court and the Florida Supreme Court erred in focusing exclusively on the 2008 IQ Tests.

1. The State's Response Is Wholly Based on Circular Logic

All of the arguments contained in the State's response are crafted upon the same rotten logical foundation– that: (1) Turner's IQ was measured by court-appointed experts in 2008 at a certain level; (2) persons with IQ scores of that level are *per se* not mentally retarded under any definition of mental retardation; and thus (3) Turner's first ground in support of certiorari review fails because Turner cannot be mentally retarded pursuant to the 2008 IQ Tests. The State's argument assumes precisely the point that is at issue. Turner disputes the accuracy and the applicability of the 2008 IQ Tests and should be granted an evidentiary hearing to challenge the applicability and accuracy of the 2008 IQ Tests.

The State's very argument reinforces that Turner was wrongly denied an evidentiary hearing to challenge the 2008 IQ Tests. The only response offered by the State in support of denying Turner an evidentiary hearing is the blunt assertion that the 2008 IQ Tests were correct, and that Turner has no business questioning them – this cavalier and draconian approach to a life and death issue is entirely improper.

For well over 200 years this Court has flatly rejected arguments based upon circular logic. *See Carcieri v. Salazar*, ___ U.S. ___, 129 S. Ct. 1058, 1077 (2009) (noting that circular logic explains nothing and criticizing "relying on one definition to provide content to the other"); *United States v. Santos*,

553 U.S. 507, 515 (2008) (criticizing a "textbook example of begging the question"); *Dickerson v. United States*, 530 U.S. 428, 456 (2000) (criticizing "a classic example of begging the question [wherein the argument] assume[s] precisely the point at issue"); *Planned Parenthood of So. Pa. v. Casey*, 505 U.S. 833, 982 (1992) ("'reasoned judgment' does not begin by begging the question"); *Burd v. Smith*, 4 U.S. (4 Dall.) 76, 87 (1802) (criticizing an argument based upon *petitio principii*).

Here, the Court should reject the State's response in its entirety. It is wholly based upon circular logic, and it offers nothing to assist in this Court's reasoned judgment on whether to grant Turner's petition.

2. Turner Has a Personal Stake in the Outcome of this Controversy and Is Not Seeking an Advisory Opinion

The State argues that Turner does not have standing to litigate "the nuances of the definition of mental retardation because Turner is not retarded under any possible definition of mental retardation. . . . Turner is not injured by Florida's current definition of mental retardation. Turner has no personal stake in the outcome of the controversy." Brief in Opposition at 15.

As described above, this argument is based entirely on circular logic, and it completely ignores Turner's first question presented for review – whether *Atkins* and the Eight and Fourteenth Amendments to

the United States Constitution permit the Supreme Court of Florida's imposition of a bright-line requirement that a capital defendant must have an intelligence quotient of 70 or below *for the capital defendant to receive an evidentiary hearing to determine whether the capital defendant is mentally retarded.* Here, Turner was denied an evidentiary hearing to challenge the court-appointed experts' measurements.

The State analogizes Turner's situation to that in *Summers v. Earth Island Institute*, ___ U.S. ___, 129 S. Ct. 1142 (2009). In *Summers*, this Court addressed whether environmental organizations had standing to enjoin the United States Forest Service from enforcing regulations exempting certain land management decisions from the notice, comment, and appeal process. 129 S. Ct. at 1147-51. Turner's situation is not even remotely similar to that in *Summers* or any of the other cases cited by the State in support of their argument that Turner lacks standing[2] – Turner's life is literally at stake, and he has clearly suffered the type of "concrete and particularized injury that standing requires." *Id.* There is no "personal stake in the outcome of the controversy" greater than one's own life. *Id.* Contrary to the State's assertions, Turner does not seek an advisory opinion on an abstruse legal

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[2] *See, e.g., Burch v. Louisiana*, 441 U.S. 130, 132 n. 4 (1972) (holding that the petitioner lacked standing to challenge the constitutionality of the provisions of law allowing conviction by a nonunanimous six member jury because he had been convicted by a unanimous six person jury).

issue; he seeks an opinion on an issue that directly affects whether he can constitutionally be executed.

3. The State Has Inaccurately Described, and Articulated the Significance of, the Standard Error of Measurement and the Flynn Effect

The State's description, and analysis of, both the Flynn Effect and the standard error of measurement ("SEM") reflects a shocking misunderstanding of both concepts.

The State argues that "the Flynn Effect is used to adjust IQ scores that are decades old . . . These IQ scores are not decades old[, thus] the Flynn Effect [is not] significant in this case." Brief in Opposition at 20 n.2. That is just wrong.

The Flynn Effect "posits that IQ scores rise over time and that IQ tests that are not 're-normed' to adjust for rising IQ levels will overstate a testee's IQ." *Walker v. True*, 399 F.3d 315, 322 (4th Cir. 2005); *see also Wiley v. Epps*, 625 F.3d 199, 203 (5th Cir. 2010) (describing the Flynn Effect as "a phenomenon positing that, over time, standardized IQ test scores tend to increase with the age of the test without a corresponding increase in actual intelligence in the general population. Those who follow the Flynn effect adjust for it by deducting from the IQ score a specified amount for each year since the test was normalized"); *see generally* American Association on Intellectual

and Developmental Disabilities, *User's Guide: Mental Retardation* at 20-21 (10th ed. 2007).

Contrary to the State's assertion, the Flynn Effect is not tethered solely to the date of the measurement of an IQ score – it instead revolves around a comparison of the date that the IQ score was measured to the date that the IQ test that was used in the measurement was last normed.[3] Thus, the State's argument that the Flynn Effect is not significant is flatly – and embarrassingly – inaccurate.

Further, the State appears to argue that because the SEM "is employed more when dealing with a single IQ score generated by a single IQ test[,]" the SEM is not significant in light of the fact that Turner received two IQ tests in July of 2008. Brief in Opposition at 20 n.2. That too is wrong.

The SEM is "an index of the variability of test scores produced by persons forming the normative sample. In other words, the SEM is a statistical measure that allows the evaluator to know the amount of error that could be present in any test." *Thomas v. Allen*, 607 F.3d 749, 757-58 (11th Cir. 2010). The SEM

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[3] For example, if Turner's IQ score were measured today using an IQ test that was last normed thirty years ago, the Flynn Effect would obviously be significant, despite the fact that the IQ score is recent. But if Turner's IQ score was measured thirty years ago using an IQ test that was normed thirty years ago, the Flynn Effect would not be significant, despite the fact that the IQ score at issue is thirty years old. The State's ignorance of this basic principle of intelligence testing is appalling.

in no way becomes irrelevant when applied to two IQ tests – and, as pointed out by the State, the two tests administered to Turner were entirely separate IQ tests with separate SEMs (the Wechsler Adult Intelligence Scale and the Stanford Binet Intelligence Scale). *See, e.g.*, *Wiley*, 625 F.3d at 214-15 (noting that the SEM is applicable to multiple IQ scores, and applying the SEM to five separate IQ scores). The fact that two IQ tests were taken here does not negate the significance of the SEM.

4. The State Does Not Even Address Turner's Second Question Presented for Review

The only evidence upon which the trial court based its decision was the 2008 IQ Tests, which were administered 24 years after Turner's offense. Turner's second question for review is whether *Atkins* and the Eighth and Fourteenth Amendments to the United States Constitution require a court to determine whether a capital defendant was mentally retarded at the time of the capital defendant's offense, rather than at the time of the capital defendant's sentencing or execution. Yet, the State's entire argument is addressed solely to Turner's current IQ score.

Thus, the State has not addressed the fact that the Florida trial court and the Florida Supreme Court erred in focusing exclusively on the 2008 IQ Tests – rather than considering Turner's IQ at the time of his offense. Because this ground is adequately

addressed in Turner's petition, it will not be discussed further in this reply.

CONCLUSION

For the reasons set forth both above and in Turner's petition, this Court should grant certiorari in this case.

Respectfully submitted,

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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

CASE NO: 16-1984-CF-6504-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

-vs-

WILLIAM T. TURNER

Defendant.

STATE OF FLORIDA)

COUNTY OF DUVAL)

HEARING before the Honorable John Southwood, Judge of the Circuit Court, Division CR-D, as cause in this matter came to be heard on the 16th of June, 2009, before Karen B. Strollo, a Notary Public in and for the State of Florida at Large and Registered Professional Reporter.

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* * *

[16] provide a report from a witness that we did not intend to use.

THE COURT: Nobody has asked you to do anything. I didn't ask – there's nothing in this order

that says you have to file a report. It is ordered Dr. Grant has to file a report, very specific, shall submit a written report of their finding to both parties and this court, both doctors. And the order which set the dates for examination, each expert shall submit the written evaluation to the court with copies to – doesn't say anything about you have to do anything. But Dr. Grant has indicated that you have interfered with his willingness to file a report pursuant to the order of the court, is that right or wrong? Nobody asked you to file anything.

MR. LOHMAN: Well, I consider him to be the defense expert in the case.

THE COURT: Wrong, wrong. He's not the defense expert. He could be if that's what you want him to be. He's the court's expert. Both of these doctors are the court's experts, they're not yours, they're not [17] confidential, they're not anything else. Okay.

So how is it that Dr. Grant would not be required to follow this order, that's all I want to know.

MR. LOHMAN: The answer to that would be that pursuant to rule 3.203, certainly my understanding, that would be the operative authority for how this proceeds.

MR. NORBITZ: Your Honor –

THE COURT: Operative proceeding. Just one minute, I want one lawyer at a time, I can't have six lawyers arguing a motion, okay?

MR. NORBITZ: Okay.

MR. LOHMAN: Your Honor, we don't intend to have six lawyers arguing.

THE COURT: I know, but he raised his hand like he wants to participate and we're not going to do that, we're going to have one lawyer on any given thing. I'm not going to hear from everybody at one time.

Okay. So I still want to know why it is that Dr. Grant apparently based upon conversations that he had with you and Miss

* * *

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[49] CERTIFICATE

STATE OF FLORIDA)

COUNTY OF DUVAL)

I, Karen B. Strollo, Registered Professional Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 27th day of July, 2009.

/s/ KAREN B. STROLLO
KAREN B. STROLLO, RPR